

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**Jun 28, 2023**

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

MICHAEL LADUE and AMANDA  
LADUE,

Plaintiffs,

v.

KETTLE FALLS INTERNATIONAL  
RAILWAY, LLC, and OMNITRAX,  
INC.,

Defendants.

No. 2:21-CV-00205-MKD

AMENDED JURY TRIAL  
SCHEDULING ORDER

**ECF No. 202**

Before the Court is the parties' Joint Proposed Amended Jury Trial Scheduling Order, ECF No. 202. On June 14, 2023, the Court held a hearing to address the trial schedule in light of Mr. LaDue's medical condition and planned treatment. *See* ECF Nos. 197, 199. Plaintiffs seek, and Defendants do not oppose, a continuance of the July 10, 2023 trial date. The Court granted the request and directed the parties provide a proposed schedule. ECF No. 201. The parties have done so, and the Court finds good cause to modify the schedule as follows. *See*

1 Fed. R. Civ. P. 16(b)(4). The parties have submitted pretrial materials. The parties  
2 may rely on those submission or submit amended materials, as outline in the  
3 Summary of Deadlines below.

4 **IT IS ORDERED:**

5 **1. General Court Procedures**

6 Pursuant to Fed. R. Civ. P. 16(b)(4), the dates set forth in this Order may be  
7 amended **only** by Order of the Court and upon a showing of good cause. Pursuant  
8 to Fed. R. Civ. P. 29, the parties may stipulate to other procedures governing or  
9 limiting discovery, except the dates set forth in this Order.

10 Counsel shall review and employ Local Civil Rule (LCivR) 83.1 (Civility)  
11 and Washington Rule of Professional Conduct 3.4 (Fairness to Opposing Party).

12 **2. Mediation**

13 If the parties elect to proceed to mediation, it should be completed as early  
14 as possible to avoid the unnecessary expenditure of judicial resources. If the  
15 parties have not reached a resolution by the date indicated in the Summary of  
16 Deadlines below, the Court will refer this matter to a Federal Magistrate Judge for  
17 settlement purposes. The parties shall file a status report by that same date  
18 regarding the settlement process.

1 If the parties would like to pursue mediation before a Federal Judge  
2 (District, Magistrate, or Bankruptcy) at an earlier date, the parties shall contact the  
3 Courtroom Deputy for a referral.

### 4 **3. Rule 26(a)(1) Exchange**

5 If not already accomplished, the parties shall disclose their Fed. R. Civ. P.  
6 26(a)(1) material no later than the date indicated in the Summary of Deadlines  
7 below.

### 8 **4. Motions to Amend Pleadings, Add Parties, for Class Certification**

9 Any motion to amend the pleadings, add parties, or for class certification  
10 shall be filed no later than the date indicated in the Summary of Deadlines below.

### 11 **5. Sealed Documents**

12 Any and all sealed documents shall be filed by the parties under the sealed  
13 event as a sealed document. The parties are not required to file a separate motion  
14 to seal a document. The parties shall file any objections to a sealed document by  
15 **no later than five days** after the filing of the sealed document. The Court will  
16 thereafter review the sealed document and any objections filed to determine  
17 whether the document should be unsealed.

18 Any party filing a sealed document shall email  
19 [dimkeorders@waed.uscourts.gov](mailto:dimkeorders@waed.uscourts.gov) to inform the Court of the filing. The email shall  
20

1 note the ECF number of the sealed document and the general nature of the  
2 document.

### 3 **6. Rule 26(a)(2) Expert Identification and Reports**

4 The parties are cautioned that failure to timely identify experts or provide  
5 reports in accordance with Rule 26 and this scheduling order may result in  
6 exclusion of such testimony absent good reason. *See Wong v. Regents of the Univ.*  
7 *of Cal.*, 410 F.3d 1052 (9th Cir. 2005). Additionally, Rule 26(a)(2) reports shall be  
8 emailed to the court at [dimkeorders@waed.uscourts.gov](mailto:dimkeorders@waed.uscourts.gov).

#### 9 **A. Plaintiff - Initial Expert Disclosures**

10 Each Plaintiff shall identify its experts and serve those experts' Rule  
11 26(a)(2) reports on all other parties no later than the date indicated in the Summary  
12 of Deadlines below. Each Plaintiff shall also provide dates for which those experts  
13 can be available for deposition. Counsel is required to file a notice with the Court  
14 indicating their compliance with this Order's Rule 26(a)(2) requirements.

#### 15 **B. Defendant - Initial Expert Disclosure**

16 Each Defendant shall identify its experts and serve those experts' Rule  
17 26(a)(2) reports on all other parties no later than the date indicated in the Summary  
18 of Deadlines below. Each Defendant shall also provide dates for which those  
19 experts can be available for deposition. Counsel is required to file a notice with  
20 the Court indicating their compliance with this Order's Rule 26(a)(2) requirements.

1                   **C. Plaintiff - Rebuttal Expert Disclosure**

2           Each Plaintiff shall identify its rebuttal experts and serve those experts' Rule  
3 26(a)(2) reports on all other parties no later than the date indicated in the Summary  
4 of Deadlines below. Each Plaintiff shall also provide dates for which those experts  
5 can be available for deposition. Counsel is required to file a notice with the Court  
6 indicating their compliance with this Order's Rule 26(a)(2) requirements.

7                   **7. Discovery Cutoff**

8                   **A. Generally**

9           All discovery, including depositions and perpetuation depositions, shall be  
10 completed by the date indicated in the Summary of Deadlines below ("Discovery  
11 Cutoff"). To be timely, discovery requests must be served sufficiently in advance  
12 of the deadline to allow for timely response by the cutoff date. All interrogatories,  
13 requests for production, and requests for admission shall be served on the opposing  
14 party no later than **70 days** prior to the Discovery Cutoff. The parties shall not file  
15 discovery, except those portions necessary to support motions or objections.

16                   **B. Depositions, Interrogatories, Requests for Production and/or**  
17                   **Admission**

18           Unless otherwise stipulated, no more than 10 depositions up to seven hours  
19 long, may be taken by the plaintiffs, or by the defendants, or by third-party  
20 defendants. Fed. R. Civ. P. 30(a)(2)(A), (d)(1).

1 Unless otherwise stipulated, any one party may serve no more than 25  
2 written interrogatories, including discrete subparts, on any other party. Fed. R.  
3 Civ. P. 33(a)(1) advisory committee’s note to 1993 amendment (explaining  
4 “discrete subparts”).

5 Unless otherwise stipulated, any one party may serve no more than 30  
6 requests for production, including discrete subparts, on any other party. LCivR  
7 34(d).

8 Unless otherwise stipulated, any one party may serve no more than 15  
9 requests for admission, including discrete subparts, on any other party. LCivR  
10 36(c).

11 A party needing relief from these limitations should timely seek relief from  
12 the Court by motion.

### 13 **C. Protective Orders**

14 Any stipulation or motion for a confidentiality agreement or protective order  
15 must be timely filed so as not to delay the discovery process or the Court’s  
16 deadlines. If confidential records are attached to court filings, “compelling  
17 reasons” must be shown to seal records attached to a dispositive motion and “good  
18 cause” must be shown to seal records attached to a non-dispositive motion.  
19 *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178-80 (9th Cir.  
20 2006).

1                   **D. Motions to Compel**

2           To avoid wasted time and expense, the parties may contact chambers to  
3 schedule a telephonic conference to obtain an expedited ruling on discovery  
4 disputes. Motions to compel seeking sanctions shall be filed in writing.

5           All motions to compel discovery must be filed and served no later than **30**  
6 **days** prior to the Discovery Cutoff.

7                   **8. Notice of To-Be-Adjudicated Claims and Affirmative Defenses**

8           Each party shall file and serve a notice no later than seven days after the  
9 Discovery Cutoff indicating which previously-pleaded claims and/or affirmative  
10 defenses will be adjudicated at trial.

11                   **9. *Daubert* and Dispositive Motions**

12                   **A. Generally**

13           All *Daubert* and dispositive motions shall be filed on or before the dates  
14 indicated in the Summary of Deadlines below. Responses and replies to *Daubert*  
15 and dispositive motions shall comply with LCivR 7. No supplemental responses or  
16 supplemental replies to any *Daubert* or dispositive motion may be filed without  
17 Court permission.

18                   **B. Summary Judgment Motions**

19           Parties are generally expected to set forth all their arguments in support of  
20 summary judgment in a single dispositive motion that conforms with the page

limits set forth in the local rules. No party shall file multiple, successive, or piecemeal motions for summary judgment without first obtaining leave of the Court.

### **C. Statement of Uncontroverted Facts**

The parties shall also file a Joint Statement of Uncontroverted Facts no later than **three days** after filing of the reply with a courtesy copy emailed to [dimkeorders@waed.uscourts.gov](mailto:dimkeorders@waed.uscourts.gov).

### **D. Notice of Hearing**

*Daubert* and dispositive motions shall be noted for hearing at least **50 days** after the date of filing.

## **10. Certification to the State Supreme Court**

No later than the date for filing dispositive motions, the parties must identify any issue of liability or damages which should be certified to the State Supreme Court.

## **11. Constitutional Challenge**

No later than the date for filing dispositive motions, the parties must comply with the procedures contained within Fed. R. Civ. P. 5.1 if the constitutionality of a federal or state statute is called into question.

## **12. Motion Practice**

### **A. Notice of Hearing**



1 Parties are to comply with LCivR 7(i) when noting motions for hearing. If  
2 oral argument is sought by a party, counsel shall first confer and determine an  
3 agreeable hearing date and time, and then contact the Courtroom Deputy at  
4 (509) 943-8172 to confirm the Court's availability for the agreed-upon hearing  
5 date and time. All non-dispositive motion hearings shall be conducted by video,  
6 unless in-person argument is approved by the Court. The parties may use cellular  
7 phones for telephonic hearings, but not in speaker mode and provided the caller is  
8 in an area with adequate cellular service and minimal background noise. Landline  
9 phones may not be used in speaker mode. All phones must be muted unless  
10 addressing the Court. Dispositive motion hearings in which oral argument has  
11 been requested will be set for in-person appearance, unless otherwise directed by  
12 the Court. If the parties seek to request the dispositive motion be heard by video,  
13 counsel shall contact the Courtroom Deputy.

#### 14 **B. Motions to Expedite**

15 If there is a need to have a motion heard on an expedited basis, the party  
16 must file a motion to expedite and an accompanying memorandum (or declaration)  
17 establishing the need for an expedited hearing. The motion shall be noted for  
18 hearing, without oral argument, no earlier than seven days after the filing of the  
19 motion, or two days after the date of filing with prior permission from the Court.  
20

1 Pursuant to local rule, motions (including stipulated motions) may **not** be noted for  
2 hearing for the same day they are filed. *See* LCivR7(i)(2).

### 3 **C. Citing Previously Filed Documents**

4 All references to a previously filed document shall cite to the electronic case  
5 filing (ECF) record number and page number within that ECF record, in the  
6 following format, “ECF No. \_\_ at \_\_.” Such documents shall not be attached as  
7 exhibits.

### 8 **D. Reliance on Deposition Testimony**

9 When a party relies on deposition testimony to support a position it takes in  
10 support or opposition to an issue, that party shall provide the Court with the  
11 pertinent excerpts of the deposition testimony relied upon and shall cite to page  
12 and line numbers of the deposition it believes supports its position. *See generally*  
13 LCivR 56(c). Submission of the entire deposition and/or failure to cite to specific  
14 portions of the deposition may result in the submission being stricken from the  
15 record. *See Orr v. Bank of America*, 285 F.3d 764, 774-75 (9<sup>th</sup> Cir. 2002).

### 16 **E. Supplemental Responses or Replies**

17 No supplemental responses or supplemental replies to any motion may be  
18 filed unless the Court grants a motion to file such documents.

1                   **F. Motions to Reconsider**

2           Motions to reconsider are disfavored. Motions must show manifest error in  
3 the prior ruling or reveal new facts or legal authority which could not have been  
4 brought to the Court's attention earlier. The motion shall be noted for expedited  
5 hearing without oral argument seven days after it is filed. No response to a motion  
6 for reconsideration need be filed unless requested by the Court. No motion for  
7 reconsideration will be granted without such a request by the Court.

8                   **G. Decisions on Motions**

9           The parties may call to inquire about the status of a decision on a motion if  
10 the Court has not issued an order within **30 days after** the hearing on said motion.

11                   **13. Witness/Exhibit Lists**

12           Witness/Exhibit lists shall be filed and served and exhibits made available  
13 for inspection or copies provided to the parties on or before the date indicated in  
14 the Summary of Deadlines below.

15                   **A. Witness Lists**

16           Witness lists shall include a brief description of the witness, a brief summary  
17 of the witness' anticipated testimony, whether the witness will be called as an  
18 expert, and any known trial date/time conflicts the witness may have.

## **B. Exhibit Lists**

Exhibit lists shall include a brief description of the exhibit. All exhibits shall be pre-marked; Plaintiffs' exhibits shall be numbered 1 to 999; Defendants' exhibits shall be numbered 1000 to 1999. Exhibits shall be marked in the lower right corner of the exhibit when practicable.

## **C. Objections**

Objections to witnesses/exhibits shall be filed and served on or before the date indicated in the Summary of Deadlines below, **and shall be heard at the pretrial conference.** All objections to witnesses shall set forth a legal basis and explanation for the objection. Objections to an exhibit or portion thereof shall be accompanied by a full and complete copy of the exhibit in question and a short legal explanation for the objection. The party seeking the admission of the witness or exhibit has **five** days, excluding federal holidays and weekends, to file a response to the opposing party's objection; no reply shall be filed.

## **14. Deposition Designations**

### **A. Generally**

Designation of substantive, as opposed to impeachment, deposition or prior testimony to be used at trial shall be highlighted – in yellow by Plaintiff or in blue by Defendant – and each party shall serve a complete, highlighted transcript of the

1 deposition or prior testimony on or before the date indicated in the Summary of  
2 Deadlines below.

### 3 **B. Cross-Designations**

4 Cross-designations shall be highlighted – in yellow by Plaintiff or in blue by  
5 Defendant – in the transcript containing the opposing party’s initial designations  
6 and shall be served but not filed on or before the date indicated in the Summary of  
7 Deadlines below.

### 8 **C. Objections**

9 All objections to designated deposition or prior testimony and the legal bases  
10 for the objections, shall be filed and served on or before the date indicated in the  
11 Summary of Deadlines below. Any designated deposition or prior testimony  
12 objected to shall be underlined in black in a complete yellow/blue highlighted copy  
13 of the deposition/prior testimony transcript described above. A paper copy of the  
14 underlined document shall be filed and served with the objections. The party  
15 seeking admission of the testimony has **five days**, excluding federal holidays and  
16 weekends, to file a response; no reply shall be filed. If the deposition was  
17 videotaped, and the videotape is to be used at trial, the party seeking to use the  
18 videotaped deposition shall indicate the relevant portion on both the written  
19 transcript and the videotape. Similarly, objections shall be made on the written  
20 transcript as explained above along with the applicable time stamp on the video

1 tape noted. All objections to deposition and prior testimony designations shall be  
2 heard and resolved at the pretrial conference with the videotape available for  
3 display.

#### 4 **15. Motions in Limine**

5 All unresolved substantive or evidentiary issues that may foreseeably arise  
6 during trial shall be addressed by motions in limine to be filed and served on or  
7 before the date indicated in the Summary of Deadlines below. Such motions will  
8 be addressed and resolved at the pretrial conference. However, motions in limine  
9 may not reargue issues already decided by the Court.

#### 10 **16. Pretrial Order**

##### 11 **A. Generally**

12 A Joint Proposed Pretrial Order prepared in accordance with LCivR 16(e)  
13 shall be filed on or before the date indicated in the Summary of Deadlines below,  
14 and a copy e-mailed, in Microsoft Word format, to  
15 [dimkeorders@waed.uscourts.gov](mailto:dimkeorders@waed.uscourts.gov).

##### 16 **B. Exhibit List**

17 The list of exhibits contained in the Joint Proposed Pretrial Order shall  
18 reflect the exhibit marking scheme described above. In preparing the Joint  
19 Proposed Pretrial Order, the parties shall confer regarding duplicative exhibits and  
20 determine which party will submit such exhibits for trial.

1           **17. Trial Briefs, *Voir Dire*, and Jury Instructions**

2                   **A. Generally**

3           Trial briefs, requested *voir dire*, and jointly proposed jury instructions shall  
4 be filed and served on or before the date indicated in the Summary of Deadlines  
5 below.

6                   **B. Trial Brief Length**

7           Trial briefs shall not exceed 20 pages without prior court approval. To  
8 obtain court approval, a party must file a motion to file an overlength brief,  
9 demonstrating good cause why supplemental briefing is necessary.

10                  **C. Jury Instructions**

11           The parties' jointly proposed jury instructions shall include a table of  
12 contents, preliminary instructions, final substantive instructions, and a verdict  
13 form. The instructions shall be sequentially numbered and include a citation of  
14 authority for each. The instructions shall, at a minimum, include instructions  
15 regarding the elements of each claim or defense, the relief sought, and otherwise  
16 comply with LCivR 51(a). A party proposing a Jury Instruction that differs from a  
17  
18  
19  
20

1 Ninth Circuit Model Civil Jury Instruction should submit a memorandum  
2 analyzing cases to support the modification.

### 3 **D. Individually Proposed Jury Instructions**

4 If the parties are unable to agree on certain instructions, they are to submit  
5 individually proposed jury instructions no later than the date the jointly proposed  
6 instructions are due. All individually submitted proposed jury instructions must  
7 adhere to the format described above and not repeat the jointly proposed  
8 instructions.

### 9 **E. Objections**

10 Any objections to the opposing party's individually submitted proposed  
11 instructions must be filed no later than five days, excluding federal holidays and  
12 weekends, after the individual proposed instructions were filed. All objections  
13 shall set forth the basis for the objection and briefly explain why the instruction in  
14 question should not be used or should be altered.

### 15 **F. Courtesy Copies**

16 Counsel shall e-mail courtesy copies of their **jointly** and **individually**  
17 proposed jury instructions, in Microsoft Word format, to  
18 [dimkeorders@waed.uscourts.gov](mailto:dimkeorders@waed.uscourts.gov).



## 18. Pretrial Conference

A pretrial conference will be held on **Thursday, November 30, 2023, at 9:00 a.m.**, in Spokane Courtroom 755. A second pretrial conference will be held on **Wednesday, January 10, 2024, at 1:30 p.m.**, in Spokane Courtroom 755. The parties and counsel may request to appear at the pretrial conferences by video. All counsel trying the case must be present at the pretrial conference.

## 19. Trial

The jury trial shall commence on **Monday, January 22, 2024**, at 9:00 a.m., in Spokane Courtroom 755. Counsel shall appear at 8:30 a.m. on the first day of trial to address any pending pretrial matters. Jury selection will begin promptly at 9:00 a.m.

## 20. Summary of Deadlines

Rule 26(a)(1) exchange	<b>COMPLETED</b>
Deadline to add parties, amend pleadings, and file for class certification	<b>COMPLETED</b>
Rule 26(a)(2) expert reports produced to other parties and emailed to the Court:	<b>COMPLETED</b>
All interrogatories, requests for production, and requests for admission, served	<b>70 Days Before Discovery Cutoff</b>
Motions to compel discovery filed	<b>30 Days Before Discovery Cutoff</b>

1	<b>Discovery Cutoff<sup>1</sup></b>	<b>COMPLETED</b>
2	Notice of to-be-adjudicated claims and affirmative defenses filed	<b>COMPLETED</b>
3	All <i>Daubert</i> motions filed	<b>COMPLETED</b>
4	All dispositive and state certification motions filed	<b>COMPLETED</b>
5	Amended Witness and exhibit lists: Lists filed and served: Objections filed and served:	<b>November 16, 2023</b> <b>November 23, 2023</b>
6	Amended Deposition designations: Designated transcripts served: Cross-designations served: Objections filed and served:	<b>November 9, 2023</b> <b>November 23, 2023</b> <b>December 7, 2023</b>
7	All motions <i>in limine</i> filed	<b>COMPLETED</b>
8	Amended Joint Proposed Pretrial Order filed and emailed to the Court	<b>November 16, 2023</b>
9	Trial briefs, jury instructions, verdict forms, requested <i>voir dire</i>	<b>December 7, 2023</b>
10	Briefing on (1) whether a failure to wear a seatbelt is considered a failure to mitigate; and (2) jury instructions and verdict form	

<sup>1</sup> The parties have stipulated to allow the disclosure of Paul Fernow as a percipient witness, and for Mr. Fernow's deposition to be taken by **October 2, 2023**. The Court finds good cause to grant a limited extension of discovery for the purpose of taking Mr. Fernow's deposition. Discovery is closed for all other purposes.

related to employment status for FELA purposes Briefs filed: Response briefs filed: Reply briefs filed:	<b>October 26, 2023</b> <b>November 9, 2023</b> <b>November 16, 2023</b>
<b>PRETRIAL CONFERENCE</b>	<b>November 30, 2023</b> <b>9:00 a.m. - SPOKANE</b>
<b>SECOND PRETRIAL CONFERENCE</b>	<b>January 10, 2024</b> <b>1:30 p.m. - SPOKANE</b>
Exhibits for trial	<b>2 Weeks Before Trial</b>
Referral to Magistrate Judge	<b>COMPLETED</b>
<b>FINAL PRETRIAL CONFERENCE</b>	<b>January 22, 2024</b> <b>8:30 a.m. - SPOKANE</b>
<b>JURY TRIAL</b>	<b>January 22, 2024</b> <b>9:00 a.m. - SPOKANE</b>

**IT IS SO ORDERED.** The District Court Executive is directed to enter this Order and provide copies to the parties.

DATED June 28, 2023.

*s/Mary K. Dimke*  
MARY K. DIMKE  
UNITED STATES DISTRICT JUDGE